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Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

GREGORY B. FERNEBOK AND JOSHUA F. FERNEBOK,
PETITIONERS

*v.*

GOVERNMENT OF THE DISTRICT OF COLUMBIA

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

DALE A. COOTER
*Counsel of Record*
COOTER, MANGOLD,
TOMPERT & KARAS, L.L.P.
5301 Wisconsin Ave., N.W.
Suite 500
Washington, D.C. 20015
(202) 537-0700

*Attorneys for Petitioners*

CURRY & TAYLOR • (202) 393-4141

## QUESTIONS PRESENTED

Petitioners, who are nonresidents of the District of Columbia, paid unincorporated business taxes for at least three years prior to filing suit in the form of a tax on their net personal incomes as a result of their membership in three real estate limited liability companies in the District of Columbia. In their lawsuit filed in the United States District Court for the District of Columbia, the Petitioners challenged the imposition of the unincorporated business tax as a violation of the District of Columbia Self-Government and Governmental Reorganization Act (the "Home Rule Act"), (Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code § 1-201.01 et seq.) and the United States Constitution. The Petitioners asserted federal question jurisdiction. This case presents the following issues:

1. Is a case in which a tax refund is not sought and which arises under the Home Rule Act, barring the District of Columbia from "imposing" certain taxes, subject to the exclusive jurisdiction of the local tax court where that exclusive jurisdiction extends by its terms only to challenges to "assessments" of tax?

2. Did the D.C. Circuit Court in this case err in summarily affirming, based on its prior decision in *Jenkins v. Washington Convention Center*, 236 F.3d 6, 11 (D.C. Cir. 2001), implicitly accepting the District Court's conclusion that there is no difference between the assessment of a tax and the imposition of a tax, a ruling that is

in direct conflict with the Federal Circuit?

3. Is declaratory judgment relief available in federal court to litigants who challenge a tax imposed on them but who do not also seek a refund of taxes paid?

4. Have the rulings of the District of Columbia Circuit in this case and in *Jenkins* improperly deprived the Petitioners of their absolute right to invoke the federal question jurisdiction of the United States District Court?

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The Opinion and Order of the United States District Court for the District of Columbia (Bates, J.)(Civ. Case No. 07-1262 ) in *Fernebok, et al. v. District of Columbia,* published at 534 F. Supp.2d 25 (D.D. C. 2008) ("Bates Decision") and granting the District of Columbia's Motion to dismiss for lack of subject matter jurisdiction, are reprinted in the Appendix hereto at 3a (hereinafter, "Pet. Appx."). The order of the United States Court of Appeals for the District of Columbia summarily affirming the Bates Decision is reprinted in Pet. Appx. at 1a.

## JURISDICTION

Petitioners assert that the United States District Court for the District of Columbia had original federal question jurisdiction over this matter pursuant to 28 U.S.C. §1331. The Bates Decision dismissing the Petitioners' Complaint, entered January 25, 2008, was a final judgment and the United States Court of Appeals for the District of Columbia Circuit had jurisdiction to review that final judgment pursuant to12 U.S.C. §1291. The Circuit Court's summary affirmance of the Bates Decision was filed June 24, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

The District of Columbia Revenue Act of 1947, Pub. L. No. 80-195, 61 Stat. 328 (1947) (the "Revenue Act of 1947"). Article I of the Revenue Act of 1947 specifically provided for a tax on individuals, both residents and nonresidents (title VI), on corporations

(Title VII), and on unincorporated businesses (Title VIII). Pet. Appx. at 35a-36a. The regulations under the Revenue Act of 1947 provide that "[t]he purpose of the unincorporated business tax was to *impose* a tax upon all business income which would be subject to the corporation franchise tax, if incorporated, regardless of whether the business is carried on by an individual, by a partnership, or by some other unincorporated entity." (Section 8-1(b) of the Regulations of the Government of the District of Columbia, promulgated August 28, 1947 [Title 16, DCRR Part 307, p. 122]) (emphasis added).

The District of Columbia Home Rule Act provides, in pertinent part, that "[t]he Council [of the District of Columbia] shall have no authority to "[i]mpose any tax on the whole or any part of their personal income, either directly or at the source thereof, of any individual not a resident of the District [of Columbia]...." D.C. Code § 1-206.02(a)(5) (2001). (Pet. Appx. at 17a).[1]

The District of Columbia imposes a tax on resident and nonresident members of unincorporated businesses (the "UB Tax" or "UBT"). The UB Tax is codified at D.C. Code § 47-1808.03. (Pet. Appx. at 21a).

The District of Columbia Court Reform and Criminal Procedure Act of 1970 ("D.C. Court Reform Act") established the local court system for the District of Columbia and is codified at D.C. Code §§11-101 *et seq.* The provisions of the D.C. Court Reform Act which are

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[1] All references in this Petition shall be to D.C. Code § 206.02 (a) (5) or to the "Prohibition" under the Home Rule Act.

pertinent hereto are codified at §§11-921(a)(3)(B), 11-1201 and 11-1202 (Pet. Appx. at 63a-64a).

The "District Clause" of the United Sates Constitution provides, in pertinent part, that Congress shall have the power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . .

U.S. Const. Art. I, § 8, cl 17.

## STATEMENT

### I. INTRODUCTION

Petitioners assert that the United States District Court for the District of Columbia had original federal question jurisdiction over this matter pursuant to 28 U.S.C. §1331. The case brought by Petitioners in the United States District Court presents the important question of whether the imposition of the UB tax by the District of Columbia on nonresidents who are members of an unincorporated business earning income in the District (but who are not "professionals" or members of a personal service business) is invalid under federal statutory law (the Home Rule Act) and the United States Constitution. That question was not answered below because the Petitioners' complaint was dismissed for want of subject matter jurisdiction. In this Petition for a Writ of Certiorari, the question is

whether the District Court erred in concluding that the tax division of the Superior Court of the District of Columbia has exclusive jurisdiction over this matter and whether the Circuit Court erred in summarily affirming that decision.

Critical to this case is the language of the so-called "commuter tax ban," the prohibition fashioned by Congress in the Home Rule Act against taxing nonresidents (termed by some courts as "the Prohibition"). As is clear from the statute, Congress decreed in the Home Rule Act that the D.C. Council shall have no authority to "*impose* any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District [of Columbia]... ." D.C. Code § 1-206.02 (a) (5) (2001)(emphasis added). (Pet. Appx. at 17a). Also critical to this case is the language of the D.C. Court Reform Act limiting the D.C. Superior Court tax division's exclusive jurisdiction to reviews of "assessment" of taxes. The Petitioners contend that there is a distinction between "assessment" of a tax (the term used in the D.C. Court Reform Act) and the "imposition" of a tax (the term used by the Home Rule Act's Prohibition).

Petitioners now seek a Writ of Certiorari because this case presents important questions that only this Court can resolve: did the United States District Court improperly deprive Petitioners from invoking that Court's subject matter jurisdiction? Is the Superior Court's exclusive jurisdiction limited to cases involving "assessments" of taxes? Was the Circuit Court decision in *Jenkins*, on which Judge Bates and the Circuit Court relied in this case

erroneously interpreted and applied by the District Court and the Circuit Court in this case? How should the conflict between the D.C. Circuit (treating "assessment" and "imposition" interchangeably) and the Federal Circuit (treating "assessment" and "imposition" as different and distinct terms) be resolved? Petitioners respectfully request this Court to grant certiorari to consider these issues.

## II. THE STATUTORY SCHEME

### *A. The District of Columbia Revenue Act of 1947*

The United States Congress, Article I, § 8, granted the power to Congress to legislate for the District of Columbia. Pursuant to that power, Congress enacted the Revenue Act of 1947. Article I of the Revenue Act of 1947 is entitled the "Income and Franchise Tax Act" and specifically provided for a tax on individuals, both residents and nonresidents (Title VI), on corporations (Title VII), and on unincorporated businesses (Title VIII). Section 3 of Title VIII imposed the tax:

> Sec. 3. Imposition and Rate of Tax---For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every unincorporated business, whether

> domestic or foreign (except as expressly exempt under title II of this article).[2]

Section 1 of Title VIII contained an exemption (the "Statutory Exemption"):

> The words "unincorporated business" do not include any trade or business which by law, customs, or ethics cannot be incorporated or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business in which capital is not a material income-producing factor.

D.C. Code Section 47-1574 (1973) (61 Stat. 345-46) (Pet. Appx. at 55a). Thus, by virtue of enacting the Revenue Act of 1947, Congress both imposed the tax and set its initial rate. Moreover, in Title X Congress stated the purpose for *imposing* the tax:

> Title X ----Purpose of this Article and Allocation and Apportionment Sec. 1. Purpose of Article--- It is the purpose of this article *to impose* (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of

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[2] Title II of the Income and Franchise Tax Act lists an extensive group of organizations and associations that are exempt from the provisions of Article I; nonresident individuals are not listed among them. 61 Stat. 334, Pet. Appx. at 45a-47a.

> carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District .... .

61 Stat. 349 (emphasis added), Pet. Appx. at 57a-58a. The regulations under the Revenue Act of 1947 provide that "[t]he purpose of the unincorporated business tax was to *impose* a tax upon all business income which would be subject to the corporation franchise tax, if incorporated, regardless of whether the business is carried on by an individual, by a partnership, or by some other unincorporated entity." (Section 8-1(b) of the Regulations of the Government of the District of Columbia, promulgated August 28, 1947 [Title 16, DCRR Part 307, p. 122]) (emphasis added). Thus, Congress addressed the very purpose of the unincorporated business tax in terms of *imposing* a tax.

### *B. The D.C. Court Reform Act of 1970*

In 1970, Congress passed the D.C. Court Reform Act, Pub. L. 91-358, title I, §111, 84 Stat. 488, D.C. Code §§11-101 *et seq.*, creating the District of Columbia Court of Appeals and the Superior Court of the District of Columbia as the local court system for the District of Columbia. D.C. Code §11-101(2). The Superior Court was granted jurisdiction over any civil action or other matter involving "an appeal from or petition for review of any *assessment* of tax (or civil penalty thereon) made by the District of Columbia[.]" D.C. Code §11-921(a)(3)(B) (emphasis added) (Pet. Appx. at 63a). The Tax Division of the Superior Court was "assigned exclusive jurisdiction of (1) all appeals from and petitions for review of any *assessment* of tax (and civil

penalties thereon) made by the District of Columbia[.]" D.C. Code §11-201(a) (emphasis added) (Pet. Appx. at 63a). *See also* D.C. Code §11-202 ("[n]otwithstanding any other provision of law, the jurisdiction of the Tax Division of the Superior Court to review the validity and amount of all *assessments* of tax made by the District of Columbia is exclusive") (emphasis added) (Pet. Appx. at 64a). Significantly, the language of each of the foregoing statutory provisions expressly limits the exclusive jurisdiction of the Tax Division to matters involving the *assessment* of a tax and does not address challenges to the *imposition* of a tax.

### *C. The Home Rule Act of 1973*

By 1967, the push for Home Rule in the District of Columbia was well under way,[3] and Congress enacted Reorganization Plan Number 3, which vested in the D.C. Council[4] the authority to *inter alia* prescribe regulations for determining the formulas for the portion of net income subject to tax under the 1947 Income and Franchise Tax Act. *See* Reorganization Plan of 1967, Pub. L. No. 90-623, 81 Stat. 948 (1967). Reorganization Plan 3 gave the Council no power to enact or impose

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[3] Between 1948 and 1966, the Senate passed six different bills granting the District some form of home rule, but each time the bill died in the House Committee for the District of Columbia. In 1967, a mayor and council, appointed by the President, replaced the then existing commissioner system. *Banner v. United States of America*, 303 F.Supp.2d 1,4 (D.D.C. 2004) (*citing Adams v. Clinton*, 90 F.Supp2d 35, 47 n.19 (D.D.C. 2000)), *aff'd*, 428 F.3d 303 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006).

[4] At that time the DC Council was appointed by the President; it was not an elected body.

taxes in the District – it simply gave the Council the authority to regulate the formulas for taxation. In 1973, however, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act (the "Home Rule Act"), (Publ. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code §§ 1-201.01 (2001), *et seq.*, Pet. Appx. at 12a). The Home Rule Act provided for an elected mayor and Council, and delegated to the Council "certain legislative powers" that were "[s]ubject to the retention of Congress of the ultimate legislative authority of the nation's capital." D.C. Code § 1-201.02 (Pet. Appx. at 12a). The Home Rule Act protects Congress's exclusive jurisdiction over the District by providing that Council enactments become law only if Congress declines to pass a joint resolution of disapproval within thirty days (or sixty days in the case of criminal laws), and by reserving the power to repeal Council enactments at any time. *See Banner v. United States of America*, 303 F.Supp.2d 1, 4-5 (D.D.C. 2004), *citing* D.C. Code § 1-206.01,1-206.02 (c)(1)-(c)(2) (2001), Pet. Appx. at 17a. The role of the Mayor is to execute and enforce the laws. *See* D.C. Code §§ 1-204.21-24 (2001). The Home Rule Act also specifically limits the Council's law making powers, enumerating matters that are not the "rightful subjects" of legislation by the Council. D.C. Code § 1-203.02 (2001), Pet. Appx. at 13a. For example, the District may not impose any tax on federal property or the property of the states; enact any act or regulation with respect to the Commission on Mental Health or the District of Columbia courts; and it may not enact any act or rule that permits the building of any structure in excess of certain height limits. *See* D.C. Code § 1-206.02 (a)(1)-(a)(8) (2001), Pet. Appx. at 17a; *Banner*, 303 F.Supp.2d at 5.

Moreover, the Home Rule Act stipulated that "all functions granted to or . . . transferred to the District of Columbia Council, as established by Reorganization Plan number 3 of 1967, shall be carried out by the Council in accordance with the provisions of [the Home Rule Act]." D.C. Code § 1-204.04 (2001), Pet. Appx. at 14a. Thus, the authority to regulate the formulas for taxing net income under the Income and Franchise Tax Act of 1947, including the UB Tax, vested in the Council by Congress in 1967, also became subject to the limitations of the Home Rule Act, including the Prohibition on the power to "impose" taxes on nonresidents . Finally, the Home Rule Act states that if it is inconsistent with any other laws, the Home Rule Act prevails, and that no law in force on January 1, 1975 (the effective date of the Home Rule Act) is deemed amended or repealed except to the extent "specifically provided herein" or to the extent "inconsistent with this chapter." D.C. Code § 1-207.61 (2001), Pet. Appx. At 18a.[5]

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[5] In September 1974, nine months after the Home Rule Act was enacted but before its effective date of January 1, 1975, Congress enacted legislation authorizing the Council *to change the rates* of taxation under the 1947 Revenue Act (including the Tax and Franchise Act) for the express purpose of raising funds to increase salaries of public servants such as teachers, police officers and firefighters. *See* Pub. L. No. 93-407, 88 Stat. 1036, § 471 (Pet. Appx. at 25a). Nothing in that Act negates Congress' intent in the Home Rule Act to preclude the Council from imposing taxes on the personal income of nonresidents. Moreover, to the extent that legislation is inconsistent with the Home Rule Act, (and Petitioners do not believe that it is), it would have been deemed amended or repealed as of January 1, 1975.

### *D. The Revenue Act of 1975*

In June 1975, the D.C. Council, pursuant the legislative authority granted to it by the Home Rule Act, adopted the Revenue Act of 1975 (subsequently enacted as D.C. Law No. 1-23). The Act was signed by the Mayor and sent to both Houses of Congress for the required thirty-day review. It was not disapproved and consequently became law on October 21, 1975. The Revenue Act of 1975 was substantially similar to the Revenue Act of 1947 and contained a provision for the taxation of unincorporated businesses.[6] Section 605 of the Revenue Act of 1975, however, made a change to the UBT: it deleted the second sentence of the "definition" section of the UB Tax, thereby repealing the Statutory Exemption for professional associations and personal service businesses. The repeal of this so-called professional exemption allowed the District of Columbia for the first time to *impose* the UB Tax on unincorporated professionals and personal service businesses, creating a tax burden on thousands of nonresidents. Thus, through the 1975 Revenue Act, the Council had legislated and imposed its own version of the UB Tax.

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[6] In 1971, Congress had enacted the Professional Corporation Act (Pub.L No.92-180, 85 Stat. 576 (1971)), and the Income and Franchise Act was amended to maintain an exemption of unincorporated professional associations after what appeared to be persuasive lobbying by representatives of the Bar associations of Virginia and Maryland. See *Bishop*, 401 A.2d at 957 (citing legislative history).

## III. THE VALIDITY OF THE UB TAX HAS NOT YET BEEN ADDRESSED BY A FEDERAL COURT

It is important for the Court to grant certiorari to resolve the jurisdictional question so that the case can be remanded back to the United States District Court for resolution on the merits. The issues which the Petitioners raise in their Complaint concerning the validity of the imposition of the UB Tax have not been addressed on the merits by any federal court, yet the issues effect countless residents not only of neighboring Maryland and Virginia, but all jurisdictions outside the District of Columbia whose residents pay the UB Tax. In a different posture, challenges to the UB Tax have been raised in state forums, with conflicting results. In each case, the non-resident taxpayer paid the tax and then sought a refund. *Bishop v. District of Columbia*, 401 A.2d 955 (D.C. App.1979), *aff'd en banc*, 411 A.2d 997 (D.C. App. 1980), *cert. denied*, 446 U.S. 966 (1980), declared that the UB Tax was a tax levied on personal income in direct violation of the Congressional Prohibition. Following *Bishop*, the Maryland Court of Appeals in *Roach v. Comptroller of the Treasury*, 327 Md. 438, 610 A.2d 754 (1992), adopted the interpretation of the statute by the *Bishop* Court, and, finding that the UB Tax was an income tax and not a franchise tax, and that the Maryland taxpayers in the case were entitled to a credit for the amounts paid to the District of Columbia as UB Taxes. *Bishop*, 610 A.2d at 757, 759.[7]

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[7] Other states have also interpreted the UB Tax to be a tax on individual income. *See, e.g.*,Mass. Dept. of Revenue, Letter Ruling 94-8: Credit for District of Columbia Unincorporated Franchise Tax, 10/4/94 (the UB Tax "is by nature and has the incidents of an income tax" even though the D.C. Council and the Comptroller

In *District of Columbia v. Califano*, 647 A.2d 761 (D.C. 1994), although acknowledging that *Bishop* did not say that the UB Tax was an "individual income tax," it did hold that the UB Tax "burdens the taxpayer personally." *Id.* at 764. The *Califano* Court concluded that "the term 'individual income tax' cannot rationally denote anything other than an income tax paid by an individual," and ruled that "guided by *Bishop*" the appellees in *Califano* met the guidelines for a tax credit under the D.C. Code. *Id.* at 765.[8]

In 1997, the Virginia Supreme Court held that, for the purpose of determining whether Virginia residents would be entitled to a credit for UB Taxes paid to the District, the UB Tax was imposed by the D.C. Council and was "illegal and unauthorized under the District of Columbia's Home Rule Act ... ." *See Mathy v. Commonwealth of Virginia, Dept of Taxation*, 253 Va. 356, 483 S.E.2d 802 (1997), *cert. denied*, 522 U.S. 967 (1997). The Supreme Court of Virginia had previously reviewed the UB Tax in *King v. Forst*, 239 Va. 557, 391 S.E.2d 60 (1990), and concluded that it was an income tax. In *King*, the

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refer to the UBT as a "franchise tax," because the UBT is based on net income and not gross receipts)(citing *King v. Forst*, 239 Va. 557, 391 S.E.2d 60 (1990); and *Roach v. Comptroller*, 610 A.2d. 754 (1992)). Other states concur in the characterization of a state's unincorporated business tax as an income tax. *See, e.g., MacFarlane v. Utah State Tax Comm'n*, 548 Utah Adv. Rep. 15, 134 P.3d 1116 (Utah 2006) (credit to Utah taxpayers for taxes paid in other states ).

[8] Title 47, D.C. Code Enactment Act of 1996, occurred after the decisions in *Bishop* and *Califano* and thus had no impact on those rulings.

plaintiff was a Virginia taxpayer and the sole proprietor of an unincorporated printing business located in the District of Columbia. The court reviewed his claim that he was entitled to a credit under (former) Va. Code § 58.1-332 for payment of the UB Tax in the District. The *King* Court held that the District's UB Tax was an income tax, not a franchise tax, and thus Virginia residents were entitled to a credit against their Virginia taxes for amounts paid to the District of Columbia. The *King* Court specifically relied on the principle of comity: that the interpretation of a particular jurisdiction's statute by its highest court should be followed by courts of other jurisdictions. 391 S.E.2d at 62 (*citing Elmendorf v. Taylor*, 10 Wheat. at 159, 6 L.Ed. at 292). Thus, the Virginia Supreme Court in *King* adopted the *Bishop* Court's interpretation and characterization of the UB Tax, and held that the UB Tax was an income tax. Like many other states, Virginia provides a credit against the individual income tax of Virginia residents for certain taxes paid to another state. Va. Code § 58.1-332. After the decision in *King*, the Virginia legislature in 1991 amended the relevant statute to deny a credit for certain taxes paid to another state which, if characterized as an income tax or a commuter tax, would be "illegal and unauthorized under such other state's controlling or enabling legislation . . .". *Id.* at § 58.1-332. Accordingly, when the District's UB Tax again appeared before the Virginia Supreme Court in *Mathy*, although the court's analysis remained the same, the result for the taxpayer was different. In *Mathy*, the appellant was a Virginia resident and taxpayer, and a general partner in a District of Columbia real estate partnership. The partnership's sole source of income for the relevant years was rental income from the operation of an office

building in the District. 483 S.E.2d at 802. The court in *Mathy* found that, consistent with the holdings in *King* and *Bishop*, the District's UB Tax is an income tax. Therefore, the court reasoned, the Mathys were entitled to a credit under the Virginia Code unless the UB Tax "would be illegal and unauthorized under such other state's controlling or enabling legislation." *Id.* at 804. The *Mathy* court then analyzed whether the UB Tax would be "illegal and unauthorized under the District of Columbia's Home Rule Act," and concluded that it was. *See* 483 S.E.2d at 804-05. Accordingly, it denied the Mathys a credit against their Virginia taxes. *Id.* at 805. Significantly, neither the *King* nor the *Mathy* appellants were lawyers, professionals, or members of a service business. Like the Petitioners here, the appellants in *Mathy* were partners in a real estate partnership whose income was derived from rental income in the District of Columbia.

In direct conflict with the *Mathy* decision, the D.C. Court of Appeals in *Bender v. District of Columbia*, 906 A.2d 277 (D.C. 2006), distinguishing its earlier decisions in *Bishop* and *Califano*, held that the imposition of the UB Tax on certain nonresident businesses is permissible because the Home Rule Act does not act as a bar to *Congress'* taxing authority, and Congress established the UBT, albeit in 1947. In both the *Bishop* and the *Califano* opinions, the D.C. Court of Appeals viewed the Prohibition under the Home Rule act as affecting the *Council's* ability to impose a the UB Tax on nonresidents, even though the *original* 1947 Revenue Act, which had been enacted by Congress, provided for such a tax.

Thus, there are conflicting state and District of Columbia Court of Appeals decisions regarding the UB Tax in the context of a state refund case. Because the precise issue raised by the Petitioners' Complaint is based on federal law - the validity of the imposition of the UB Tax under the Constitution and the Congressionally enacted Home Rule Act - and does not seek a refund but only declaratory relief, it is important for the Court to grant certiorari to consider whether the lower courts should have exercised jurisdiction and given Petitioners the federal forum they sought.

## IV. THE PROCEEDINGS BELOW

Although not residents of the District of Columbia, an unincorporated business tax was imposed on the Petitioners.[9] The Petitioners are residents of the State of Maryland who are members of three limited liability companies and who have paid UB Taxes to the District of Columbia during the last three years preceding the filing of their Complaint in the District Court. Petitioners continue to be members of the three liability companies and continue to be subject to the UB Tax. The District of Columbia is a federal district of the United States with limited powers of taxation under the Home Rule Act enacted by the United States Congress. D.C. Code Ann. Sections 1-201.01, *et seq.* The UB Tax is a tax imposed by the District of Columbia on the personal income of the Petitioners who are not residents of the District Columbia. D.C. Code Ann. Section 47-1808.03 (2001).

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[9] Petitioners did not file refund claims with the District of Columbia Tax Office. Under *Bender v. District of Columbia*, 906 A.2d 277 (D.C. 2006), those claims would have been denied.

Petitioners contend that the UB Tax cannot be imposed in the form of a tax on personal income because the Home Rule Act forbids such a tax. Petitioners further contend that the United States District Court has federal question jurisdiction to determine the propriety of the *imposition* of the UB tax.

Seeking declaratory relief, the Petitioners filed their Complaint in the United States District Court for the District of Columbia on July 16, 2007. The Petitioners sought a declaration that the imposition of the UB Tax on nonresidents of the District of Columbia is contrary to federal law, including the United States Constitution, and is invalid. They asserted that the District Court had subject matter jurisdiction pursuant to 28 U.S.C. Section 1331, contending that the action is founded on the existence of a federal question of law arising under the Constitution of the United States, Article I, Section 8, Clause 17 and the Home Rule Act. The Petitioners alleged in their Complaint that by *imposing* a tax on their personal income, the District of Columbia has violated the limitation set forth in the Home Rule Act. This limitation is that the Council of the District of Columbia "shall have no authority to . . . [i]mpose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District." D.C. Code Ann. §1-206.02(a)(5) (2001).

The District of Columbia moved to dismiss the Petitioners' Complaint, arguing that the tax division of the District of Columbia Superior Court has exclusive jurisdiction over this matter because it involves taxes. The District Court (Bates, J.) agreed and granted the District of Columbia's Motion to Dismiss the

Petitioners' action for lack of subject matter jurisdiction. Pet. Appx. at 3a. The Petitioners then noted an appeal to the United States Circuit Court for the District of Columbia. After that appeal was docketed, the District of Columbia moved for summary affirmance. By order filed June 24, 2008, the United States Court of Appeals granted the District of Columbia's Motion, summarily affirming the Bates Decision. Pet. Appx. at 1a.

## REASONS FOR GRANTING THE PETITION

### I. The United States Court of Appeals has decided an important question of federal law that has not been, but should be, decided by this Court.

This case involves important issues of the District of Columbia Home Rule Act, the scope of the exclusive jurisdiction granted by Congress to the Tax Division of the District of Columbia Superior Court, concepts of federalism, and issues of standing. The confluence of *Jenkins v. Washington Convention Center*, 236 F.3d 6 (D.C. Cir. 2001), and the D.C. Circuit's summary affirmance in this case of the Bates Decision (which summary affirmance is based on *Jenkins*) has all but destroyed the vitality of the Home Rule Act and the Constitution's Prohibition Clause as they may relate to any tax matter arising in the District of Columbia. The result in this case, which deprived the Petitioners of their federal forum to challenge the imposition of the tax, cannot be sustained within any rational analytical framework. The road that has led to this outcome is built on the slimmest of threads - *dicta* in *Jenkins*, reliance on *Jenkins* by the

District Court in this case despite substantial differences in relief sought, circuitous reasoning in the Bates Decision that did not give deference to the allegations of the Petitioners' Complaint, and summary affirmance without benefit of merits briefing in the Circuit Court below.

Reliance on *Jenkins* by the District Court and the Circuit Court in this case is problematic for two reasons: first, there was a substantial difference in the nature of the relief sought; and second, only the *dicta* from *Jenkins*, not its holding, could support the Bates Decision. The *Jenkins* plaintiffs sought refunds of taxes paid. 236 F.3d at 7. The United States District Court in *Jenkins* granted the defendant's motion to dismiss based on a lack of subject matter jurisdiction. 236 F.3d at 7. Citing the DC. Court Reform Act (D.C. Code §§11-921(a)(3)(B), 11-1201 and 11-1202), the Circuit Court affirmed "[b]ecause Congress has granted exclusive jurisdiction over challenges to District of Columbia ***tax assessments*** to the District of Columbia courts[.]" 236 F.3d at 7-8 (emphasis added). The language of this holding is quite narrow, as it is limited to challenges over tax assessments, and the relief sought, a refund of taxes paid, was very specific. By contrast, the Petitioners here did not challenge the assessment of their taxes and did not seek a refund of taxes paid. Rather, they challenged the very imposition of the UB tax as violative of the Home Rule Act and the prohibition clause of the Constitution. Thus, *Jenkins* should not control.

Despite the narrow holding of *Jenkins*, the District Court found that it did control here. In doing so, the District Court took a two-step approach. First,

the court applied the broad *dicta* of *Jenkins* rather than its narrow holding. Although having held that the District of Columbia courts have exclusive jurisdiction to hear challenges to *tax assessments*, the *Jenkins* Court later in its opinion also stated that "Congress unambiguously intended to vest in the District of Columbia courts exclusive jurisdiction over ***all challenges*** to District of Columba taxes including those involving federal statutory or constitutional claims in lieu of (rather than concurrently with) jurisdiction in the federal courts." 236 F.3d at 11 (emphasis added). Not only was this broad statement unnecessary to the narrow holding announced earlier in the court's opinion, the statement is incorrect because the Court Reform Act vested exclusive jurisdiction in the Superior Court only as to challenges involving the tax assessment.

Although the Bates Decision quotes the *Jenkins* Court's broad statement, the Bates Decision did not fully embrace the broader statement as the holding of *Jenkins*, for if it had done so, the analysis would have ended. Instead, the District Court here recognized that the D.C. Court Reform Act speaks in terms of tax "assessments" and that *Jenkins* involved a challenge to a tax "assessment" and that the *Jenkins* Court "specifically framed its holding consistent with that statutory language." Bates Decision (Pet. Appx. at 6a). Once the District Court acknowledged the narrowness of the holding of *Jenkins*, it should have concluded that neither *Jenkins* nor the D.C. Court Reform Act was a bar to its exercise of federal subject matter jurisdiction over Petitioners' claims. Instead, however, the District Court set out to make the Petitioners' claim an "assessment" claim so that it would be governed by

*Jenkins*. To recharacterize Petitioners' claim, the District Court considered the meanings of the words "assessment" and "imposition" as set out in Black's Law Dictionary and concluded, essentially, that the terms are interchangeable. Bates Decision (Pet. Appx. at 6a-7a). Such reliance has been expressly rejected by other courts (as discussed more fully below) which have recognized that in tax cases, "assessment" and "imposition" have different meanings. *See Ammex, Inc. v. United States*, 419 F.3d 1342 (Fed. Cir. 2005); *Ammex Inc. v. United States*, 341 F.Supp.2d 1308, 1313 (Ct. Int'l Trade 2004) ("*Ammex I*"). In *Ammex I*, the Court expressly rejected the government's argument that the Court should apply the common meaning of "assess" by looking to the dictionary definition defining "assess" as "impose." 341 F.Supp.2d at 1313. As *Ammex I* noted: "since dictionaries contain many definitions for the term 'assess,' most courts use the Internal Revenue Code definition." 341 F. Supp.2d at 1313. The Bates Decision simply found, based on the dictionary meaning that "assess" and "impose" have identical meanings, and that the Petitioners' challenge, therefore, comes within the express language of the D.C. Court Reform Act conferring exclusive jurisdiction on the D.C. Superior Court Tax Division over challenges to tax assessments.

On appeal below, the D.C. Circuit did embrace the broader language from page 11 of the *Jenkins* opinion and cited to it (rather than to the more narrow holding of *Jenkins*) in summarily affirming the Bates Decision, stating:

> Appellants' complaint involves a challenge to District of Columbia taxes and, as such, was

> properly dismissed by the district court on the ground that exclusive jurisdiction lies in the Superior Court for the District of Columbia. *See* D.C. Code §§11-921(a)(3)(b), 11-1201 and 11-1202; *Jenkins v. Washington Convention Center*, 344 U.S. App. D.C. 315, 236 F.3d 6, *11* (D.C. Cir. 2001).

Pet. Appx. at 1a-2a (emphasis added). Because the D.C. Circuit affirmed the Bates Decision without an opinion, it is not clear whether it based the affirmance only on the broad language in *Jenkins*, whether it equated "assess" and "impose," or some combination of the thereof. The result, however, is the same - it is to erroneously subject the Petitioners' "imposition" challenge to the exclusive jurisdiction of the tax division of the D.C. Superior Court.

## II. By summarily affirming the Bates Decision, the District of Columbia Circuit Court has sanctioned the lower court's erroneous standing analysis in declaratory judgment cases so as to call for an exercise of this court's supervisory power.

The Petitioners sought declaratory relief as to the propriety of the imposition of the UB tax, challenging the imposition as a violation of federal statutory (the Home Rule Act) and Constitutional law. The District Court concluded that to have standing to seek such relief, the Petitioners must necessarily be challenging their actual tax liability as assessed (Bates Decision (Pet. Appx. at 7a-8a)) and, once viewed as a challenge to the *assessment*, the District Court easily

found that the Superior Court Tax Division had exclusive jurisdiction over such matters. The District Court's reasoning, sanctioned by the D.C. Circuit when it summarily affirmed the District Court decision, departed from this Court's decisions regarding standing. The fact that in this action the Petitioners sought declaratory relief only and not damages or refund does not deprive them of standing, especially where, as here, the adverse action is being taken by a government rather than a private party. *See Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), 127 S.Ct. 764 (2007). *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the case cited by Judge Bates below, does not support Judge Bates' finding that there can only be standing if the Petitioners are challenging the *assessment* of the tax.[10] The issue in *Lujan* was whether a plaintiff has standing where the subject of the government regulation (or lack of regulation) was not the plaintiff but instead a third-party. 504 U.S. at 561-62. The Petitioners, however, do not allege that they are injured by the District of Columbia's taxing of a third-party. To the contrary, they have alleged that they were injured by imposition of the tax. This is exactly they type of situation which

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[10] In assuming that the Petitioners must be challenging the tax *assessment*, the District Court simply ignored the allegations of the Petitioners' Complaint, notwithstanding that on a motion to dismiss for lack of subject matter jurisdiction the Court must accept as true the allegations pleaded. *See Jerome Stevens Pharmaceuticals, Inc. v. Food & Drug Administration*, 402 F.3d 1249, 1250, 1253-55 (D.C. Cir. 2005) (reinstating Counts I and II which were erroneously dismissed by District Court after it re-cast plaintiff's allegations leading District Court to conclude that there was no subject matter jurisdiction).

the *Lujan* Court recognized as one in which standing is conferred "with little question":

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has cause him injury, and that a judgment preventing or requiring the action will redress it.

504 U.S. at 561-62.

That the Petitioners seek forward looking declaratory relief and not damages for past injury is sufficient to confer standing. This was the precise issue in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The plaintiff sought declaratory and injunctive relief against "any *future* use of subcontractor compensation clauses." 515 U.S. at 210 (emphasis in original). The issue as framed by this Court was whether "the future use of subcontractor compensation clauses will cause [plaintiff] 'imminent' injury." 515 U. S. at 211. Because the Petitioners have not terminated their business and it is very likely that the District of Columbia will continue to impose a tax on their income in the future, a challenge to the imposition of the tax (rather than the assessment) is sufficient to confer standing. Judge Bates erred when he found that such a challenge would not confer standing. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

The Bates Decision, sanctioned by the District of Columbia Circuit, additionally strays from this Court's precedents in that it fails to recognize that an exclusive grant of subject matter jurisdiction to a state tribunal must be closely analyzed to determine the scope of the exclusivity. In *International Union, United Automobile, Aerospace and Agricultural Workers of America v. Brock*, 477 U.S. 274 (1986), a federal statute, the Trade Act of 1974, provided certain benefits to workers laid off because of competition from imports. 477 U.S. at 277. The Act permitted the labor secretary to delegate to state agencies the responsibility of determining eligibility for benefits. 477 U.S. at 277. Eligibility determinations were to be made by the states in accordance with federal guidelines. 477 U.S. at 277-78. After certain members of the plaintiff union (the "UAW") were denied benefits, the UAW and some individual members filed suit in the United States District Court seeking declaratory relief by way of declaration that the manner in which the labor secretary had interpreted the regulations (as reflected in a handbook) was improper and seeking an injunction requiring the labor secretary to notify the state agencies that the handbook was invalid and directing the agencies to re-review the determinations. 477 U.S. at 278-79. The District Court denied the labor secretary's summary judgment motion, rejecting his argument that federal jurisdiction was precluded because the regulations made entitlement decisions reviewable only in the same manner as under applicable state law. 477 U.S. at 279. On appeal, the Circuit Court for the District of Columbia reversed on standing grounds. 477 U.S. at 280. In this Court, the labor secretary argued that benefits determinations must be

made in state court. 477 U.S. at 280. Rejecting the secretary's argument, this Court wrote:

> The Trade Act provision does not foreclose review in federal court of ***every claim*** relating to the Acts's application by federal and state officials. While the act vested state courts with exclusive jurisdiction over claims challenging a state agency's application of federal guidelines to the benefit claims of individual employees, ***there is no indication that Congress intended §2311(d) to deprive federal district courts of subject-matter jurisdiction under 28 U.S.C. §1331(a) (1976 ed.) to hear statutory or constitutional challenges to the federal guidelines themselves***. Indeed, we have frequently upheld a contrary principle: that although review of individual eligibility determinations in certain benefit programs may be confined by state and federal law to state administrative and judicial processes, ***claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court.***

477 U.S. at 285 (emphasis added).

The exclusive grant of jurisdiction to the Tax Division of the D.C. Superior Court, like the exclusive grant of jurisdiction to the state courts in the *UAW* case, is not unbounded and does not extend by its terms to ***all*** claims. The Petitioners here did not seek in District Court a review of the amount of taxes assessed, nor did they seek a refund in that court of UB

taxes paid. Rather, like the petitioners in *UAW*, they lodged a statutory and constitutional challenge to the UB tax statute and to the very imposition of the tax. The District Court ***does have*** subject matter jurisdiction over that challenge.

## III. The D.C. Circuit is in conflict with the Federal Circuit as to the meaning of "assessment" and "imposition."

Not only was the Bates Decision incorrect to equate the terms "assess" and "impose," but the result is that there is now a conflict between the D.C. Circuit and the Federal Circuit as to the meaning of those terms in a tax case. Read together, the Bates Decision, the Circuit Court's affirmance of the Bates Decision, and *Jenkins* (on which both the Bates Decision and the Circuit Court relied in this case) hold that there is no difference between the "imposition" of a tax and the "assessment" of a tax. The consequence is an expansion of the exclusive jurisdiction of the D.C. Superior Tax Division and a curtailment of the jurisdiction of the United States District Court for the District of Columbia, all caused by erroneous reliance on a dictionary definition. Not only is this outcome erroneous, it is in conflict with the Federal Circuit. As noted above, in *Amex II*, the Federal Circuit rejected reliance on a dictionary meaning, holding that there is a difference in the two terms. The Federal Circuit re-affirmed its holding recently in *Nufarm America's, Inc. v. United States*, 521 F.3d 1366 (Fed. Cir. 2008), stating that in *Amex II*, "[*a*]*ssessment* was found to refer to a recordation of the calculated amount of liability, while *imposition* was found to be the creation, not calculation of, a liability." 521 F.3d at 1370 (emphasis in original).

The *Nufarm* Court applied those definitions to the case before it and concluded that the regulation in issued "impose[d] liability upon import while postponing the assessment of the amount of the previously imposed importation duty." 521 F.3d at 1370. Because the liability was *imposed* at the time of import, the fact that the amount was not assessed until export did not place an unconstitutional tax on exports - the focus was the time of the imposition. 521 F.3d at 1370.

Thus, there is a direct conflict between the D.C. Circuit and the Federal Circuit regarding the meaning of the terms "impose" and "assess" in a tax situation. The Federal Circuit's conclusion that "imposition" is tied to liability and that "assessment" is tied to calculation and collection is the better reasoned of the two. The analysis adopted by the Federal Circuit is consistent with the statutory scheme for the UB Tax, whereas the D.C. Circuit's conclusion is not. That this difference exists is evidenced by the statutory scheme itself. Chapter 18 of Title 47 of the District of Columbia Code is entitled "Income and Franchise Taxes." Chapter 18, in turn, contains seventeen subchapters. Subchapters VI through IX identify the various taxes that the District "levies" or "imposes:" tax on residents and nonresidents (subchapter VI); tax on corporations and financial institutions (subchapter VII); tax on unincorporated businesses (the UB Tax) (subchapter VIII); and tax on estates and trusts (subchapter IX). It is subchapter XII, entitled "Assessment and Collection: Time of Payment," which provides for the assessment and payment of the taxes imposed by subchapters VI through IX. *See* D.C. Code §§47-1812.05, 47-1812.07. Thus, the references in Section 11-921(a)(3)(B), 11-1201 and 11-1202 granting exclusive jurisdiction to the Tax

Division of the Superior Court over appeals from and petitions for review of ***"assessments"*** of tax necessarily refers to ***assessments*** under subchapter XII of chapter 18 of Title 47 and not to the imposition of the tax under subchapters VI through IX. It is presumed that Congress legislates with care and had it intended to equate "assessment" and "imposition," it would have said so expressly rather than leave it to implication. *Cf. Palmore v. United States*, 411 U.S. 389, 395 (1973) (construing meaning of phrase "statute of any state" as being inapplicable to District of Columbia Code, Supreme Court stated that it was "entitled to assume that in amending §1257, congress legislated with care, and that had congress intended to equate the District Code and state statutes for the purposes of §1257, it would have said so expressly, and not left the matter to mere implication"). Particularly regarding jurisdictional statutes, the *Palmore* Court stated: "Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes." *Palmore*, 411 U.S. at 396. Because the Petitioners are challenging the *imposition* of the UB Tax under Subchapter VIII, not an *assessment* of tax under Subchapter XII, they are not subject to the exclusive jurisdiction provisions of the Superior Court of the District of Columbia as set forth in provisions of the 1970 Court Reform Act. The divestiture of federal court jurisdiction relates only to the jurisdiction of a federal court to award monetary damages by way of tax refund based on a challenge to a tax assessment; it does not divest the court of federal question jurisdiction over requests for declaratory relief.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

DALE A. COOTER
*Counsel of Record*
COOTER, MANGOLD, TOMPERT
& KARAS, L.L.P.
5301 Wisconsin Avenue, N.W.
Suite 500
Washington, D.C. 20015
(202) 537-0700

*Attorneys for Petitioners*
*Gregory B. Fernebok and Joshua F. Fernebok*

No. 08-7020

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Gregory B. Fernebok and Joshua F. Fernebok,
Appellants

v.

District of Columbia Government,
Appellee

June 24, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

JUDGES: BEFORE: Garland, Brown, and Griffith, Circuit Judges.

*ORDER*

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 260 U.S. App. D.C. 334, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellants' complaint involves a challenge to District of Columbia taxes and, as such, was properly dismissed by the district court on the ground that exclusive jurisdiction

lies in the Superior Court for the District of Columbia. *See* D.C. Code §§ 11-921(a)(3)(B), 11-1201 and 11-1202; *Jenkins v. Washington Convention Center*, 344 U.S. App. D.C. 315, 236 F.3d 6, 11 (D.C. Cir. 2001).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

***Per Curiam***

1/25/2008
Civil Action No. 07-1262 (JDB)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREGORY B. FERNEBOK, et al.,
Plaintiffs,

v.

DISTRICT OF COLUMBIA,
Defendant.

# MEMORANDUM OPINION

Plaintiffs Gregory and Joshua Fernebok ("plaintiffs") bring this declaratory judgment action against the District of Columbia ("defendant" or "District") challenging the District of Columbia unincorporated business franchise tax. Plaintiffs are not residents of the District of Columbia, and assert that the tax violates federal law, including the Constitution. Defendant has moved to dismiss for lack of subject matter jurisdiction on the ground that, pursuant to statute, exclusive jurisdiction over this challenge to a District of Columbia tax matter lies in the Superior Court of the District of Columbia. For the reasons explained below, this Court agrees, and therefore will grant defendant's motion to dismiss.

## BACKGROUND

The facts, drawn from the complaint, are not in dispute. Plaintiffs are not residents of the District of Columbia.

They are members of unincorporated businesses ("UBs"), and they assert that they have paid UB franchise tax to the District of Columbia pursuant to D.C. Code § 471808.03 (2001), at least over the last three years. Plaintiffs seek a declaratory judgment that imposition of the UB franchise tax on them, as non-resident members of a UB, is unlawful under the United States Constitution (relating to Congress's legislative control over the District of Columbia), and the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), D.C. Code §§ 1-201.01 (2001). In response, defendant asserts that Congress has vested exclusive jurisdiction over challenges to District of Columbia tax assessments in the Superior Court of the District of Columbia, and hence has precluded this Court from exercising jurisdiction over plaintiffs' challenge to the UB franchise tax. Defendant contends that this grant of exclusive jurisdiction to the District of Columbia courts is manifest in Congress's enactment of D. C. Code §§ 11 -921(a)(3)(B) and 11-1202 (2001) and further supported by this Circuit's application of those provisions in Jenkins v. Washington Convention Ctr., 236 F.3d 6, 7 (D.C. Cir. 2001).

## DISCUSSION

The core of defendant's motion is simple and unassailable. Faced with a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), it is plaintiffs' burden to establish that jurisdiction exists in this Court. See, e.g., Shaw v. Marriott Int'l, Inc., 474 F. Supp. 2d 141,144 (D.D.C. 2007) (citing KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936)). Section 11-92 1(a)(3)(B) provides that the

Superior Court has jurisdiction over "any civil action or other matter, at law or in equity, which ... involves an appeal from or petition for review of any assessment of tax (or civil penalty thereon) made by the District of Columbia," and sections 111201 and 11-1202 confirm that the jurisdiction of the Tax Division of the Superior Court regarding review of the validity or amount of District of Columbia tax assessments is "exclusive." The D.C. Circuit in Jerkins has concluded that this exclusive jurisdiction in Superior Court over tax challenges applies even where federal or constitutional issues are raised: "Congress unambiguously intended to vest in the District of Columbia courts exclusive jurisdiction over all challenges to District of Columbia taxes including those involving federal statutory or constitutional claims in lieu of (rather than concurrently with) jurisdiction in the federal courts." 236 F.3d at 11.[1]

As clear and unequivocal as that legal assessment is, it is not quite the end of the analysis. Plaintiffs argue that the D.C. Code provisions and Jenkins only govern jurisdiction over challenges to tax assessments, while here they challenge the imposition of the UB franchise tax through a declaratory judgment action. But the distinction plaintiffs artfully draw is not determinative of this Court's jurisdiction over the subject matter of this case.

Jenkins speaks broadly in describing the exclusive jurisdiction of the District of Columbia courts "over all challenges to District of Columbia taxes." 236 F.3d at 11. Confirming this clear congressional intent to place exclusive jurisdiction in the District of Columbia courts, the court in Jenkins noted that Congress had simultaneously repealed the provision "vesting

concurrent jurisdiction over matters related to District of Columbia taxes" in this Court. Id. Hence, the ruling in Jenkins would seem quite comprehensive. Still, it is fair to note that the relevant statutes, D.C. Code §§ 11-921(a)(3)(B) and 11-1202 (2001), speak in terms of "assessments" of tax, and Jenkins involved a challenge to tax assessments in which the plaintiffs sought refunds. Indeed, the court of appeals specifically framed its holding consistent with that statutory language. See 236 F.3d at 7 ("Because Congress has granted exclusive jurisdiction over challenges to

District of Columbia tax assessments to the District of Columbia courts, ... we affirm the dismissal of the complaint for lack of subject matter jurisdiction.") (statutory citations omitted). Under the relevant District of Columbia tax statutes, a tax is imposed on unincorporated businesses at specified rates, and is payable by the persons conducting the unincorporated business. See D.C. Code §§ 47-1810.01(2), -1808.03 & -1808.05.

But an "assessment" is defined as both the "[d]etermination of the rate or amount of something, such as a tax," and the "[i]mposition of something, such as a tax ... , according to an established rate; the tax ... so imposed." Black's Law Dictionary 125 (8th ed. 2004). The assessment of a tax is the fixing or ascertaining of the amount from which both liability and appeal rights arise. See Hellerstein, State and Local Taxation 980 (1997). Any distinction, then, between assessment and imposition of a tax is illusory for purposes of the jurisdiction of this Court over plaintiffs' challenge to the District of Columbia UB franchise tax. Although plaintiffs' complaint is purposefully vague, the tax was

imposed and assessed on plaintiffs in a specific amount for specific years, and it is the imposition/assessment of that tax liability that plaintiffs must be challenging. Such a challenge to the assessment of the UB franchise tax -- the common legal definition of which term includes the concept of imposition of the tax -- lies within the exclusive jurisdiction of the District of Columbia courts by statute and under the clear holding in Jenkins.

Indeed, plaintiffs must be challenging their actual tax liability as assessed, because otherwise they would not have standing to bring this action and no case or controversy would be presented. To have standing, plaintiffs must have suffered an actual injury in fact that is concrete and particularized, not conjectural or hypothetical. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Imposition and assessment of UB franchise tax liability against plaintiffs satisfies that standard, but a vague or abstract challenge to the District of Columbia Code provisions, absent actual application to plaintiffs, would not. A challenge to a hypothetical imposition and assessment of a tax, with only a hypothetical injury, does not state a case or controversy or establish a plaintiffs standing to sue, and hence must be dismissed for lack of subject matter jurisdiction. See Nat'l Taxpayers Union, Inc. v. United States, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (noting that the Supreme Court has "expressly disfavored" granting standing to persons challenging the tax liabilities of others, citing Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 46 (1996) (Stewart, J., concurring), and South Carolina v. Regan, 465 U.S. 367, 381 (1984)); see also Henderson v. Stalder, 287 F.3d 374, 379 (5th Cir. 2002) ("in cases in which a state taxpayer

challenges the constitutionality of a state law, he must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement").

Plaintiffs fare no better with their reliance on Banner v. United States, 428 F.3d 303 (D.C. Cir. 2005), and Marshall v. Marshall, 547 U.S. 293 (2006), to support their expansive view of federal jurisdiction. In Banner, the District of Columbia and several citizens invoked federal jurisdiction to challenge the constitutionality of the Home Rule Act provision prohibiting the D.C. Council from imposing a commuter tax. The exclusive jurisdiction provisions of D.C. Code § § 11 -921(a)(3)(B) and 11-1202, however, were not at issue because there was no challenge to the assessment (or imposition) of a tax -- indeed, no District of Columbia tax provision was involved -- and hence federal jurisdiction was appropriate and unexceptional. Marshall examined the boundaries of the judicially-created probate exception to federal jurisdiction, holding that the exception "does not bar federal courts from adjudicating matters outside [the exception's] confines and otherwise within federal jurisdiction," and hence an action for tortious interference could proceed in federal court. Marshall, 547 U.S. at 311-12. Challenges to District of Columbia tax assessments, on the other hand, are by statute not within federal jurisdiction because Congress granted exclusive jurisdiction over such cases to the District of Columbia courts. Jenkins, 236 F.3d at 7; Miller v. District of Columbia, No. 06-1935, 2007 WL 1748890, at *3 (D.D.C. June 18, 2007). Hence, Marshall is inapposite here.

Finally, the result compelled by statute and the decision in Jenkins is also consistent with the Tax Injunction Act, 28 U.S.C. § 1341, which provides that:

> [t]he district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This provision reflects congressional recognition that states function best when their tax systems are not subjected to federal court examination, see Fair Assessments in Real Estate Assn v. McNary, 454 U.S. 100, 102-03 (1981), and precludes declaratory judgments by federal district courts on state tax matters, see Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 586-87 (1995). Although the D.C. Circuit did not reach the issue in Jenkins, that court noted that the district court ruled that the District of Columbia was a "State" for purposes of § 1341 and that the constitutional claims brought there were barred because an adequate remedy existed under District of Columbia law. See Jenkins, 236 F.3d at 9.

This Court likewise will not resolve the threshold jurisdictional issue in this case on the basis of the bar under § 1341. Nonetheless, the result reached here parallels the mandate of that provision. As noted earlier (see p.3 n. 1, supra), moreover, a challenge identical to that brought by plaintiffs here has been rejected by the District of Columbia courts. See District of Columbia v. Bender, 906 A.2d 277 (D.C. 2006), cert. denied, 127 S. Ct. 1356 (2007). But the likelihood of losing a challenge in the District of Columbia courts based on prior

decisions does not make that remedy any less "plain, speedy and efficient" under Sec. 1341, as otherwise the purpose and benefits of the Tax Injunction Act would be altogether nullified.

## CONCLUSION

For the foregoing reasons, the Court will grant defendant's motion to dismiss for lack of subject matter jurisdiction. An order consistent with this resolution will be issued separately.

/s/
JOHN D. BATES
United States District Judge

Dated:January 25, 2008

Footnote

[1]As both sides note, a challenge identical to that brought by plaintiffs has been unsuccessfully pursued through the District of Columbia courts all the way to the Supreme Court. See District of Columbia v. Bender, 906 A.2d 277 (D.C. 2006), cert. denied, 127 S. Ct. 1356 (2007).

1/25/08
Civil Action No. 07-1262 (JDB)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREGORY B. FERNEBOK, et al.,
Plaintiffs,

v.

DISTRICT OF COLUMBIA,
Defendant.

ORDER

Upon consideration of defendant's motion to dismiss for lack of subject matter jurisdiction, and for the reasons stated in the memorandum opinion issued on this date, it is hereby

ORDERED that defendant' s motion to dismiss is GRANTED and the complaint is DISMISSED for lack of subject matter jurisdiction.

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

D.C. Code § 1-201.01 (2001):

> Short Title. This chapter may be cited as the "District of Columbia Home Rule Act".

D.C. Code § 1-201.02 (2001):

> Purposes.
>
> (a) Subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.
>
> (b) Congress further intends to implement certain recommendations of the Commission on the Organization of the Government of the District of Columbia and take certain other actions irrespective of whether the charter for greater self-government provided for in subchapter IV of this chapter is accepted or rejected by the registered qualified electors of the District of Columbia.

D.C. Code § 1-203.02 (2001):

> Legislative power. Except as provided in §§ 1-206.01 to 1-206.03, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States.

D.C. Code § 1-204.04 (2001):

Powers of the Council.

(a) Subject to the limitations specified in §§ 1-206.01 to 1-206.04, the legislative power granted to the District by this chapter is vested in and shall be exercised by the Council in accordance with this chapter. In addition, except as otherwise provided in this chapter, all functions granted to or imposed upon, or vested in or transferred to the District of Columbia Council, as established by Reorganization Plan No. 3 of 1967, shall be carried out by the Council in accordance with the provisions of this chapter.

(b) The Council shall have authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the District and to define the powers, duties, and responsibilities of any such office, agency, department, or instrumentality.

(c) The Council shall adopt and publish rules of procedures which shall include provisions for adequate public notification of intended actions of the Council.

(d) Every act shall be published and codified upon becoming law as the Council may direct.

(e) An act passed by the Council shall be presented by the Chairman of the Council to the Mayor, who shall, within 10 calendar days (excluding Saturdays, Sundays, and holidays)

after the act is presented to him, either approve or disapprove such act. If the Mayor shall approve such act, he shall indicate the same by affixing his signature thereto, and such act shall become law subject to the provisions of § 1-206.02(c). If the Mayor shall disapprove such act, he shall, within 10 calendar days (excluding Saturdays, Sundays, and holidays) after it is presented to him, return such act to the Council setting forth in writing his reasons for such disapproval. If any act so passed shall not be returned to the Council by the Mayor within 10 calendar days after it shall have been presented to him, the Mayor shall be deemed to have approved it, and such act shall become law subject to the provisions of § 1-206.02(c) unless the Council by a recess of 10 days or more prevents its return, in which case it shall not become law. If, within 30 calendar days after an act has been timely returned by the Mayor to the Council with his disapproval, two-thirds of the members of the Council present and voting vote to reenact such act, the act so reenacted shall become law subject to the provisions of § 1-206.02(c).

(f) In the case of any budget act adopted by the Council pursuant to § 1- 204.46 and submitted to the Mayor in accordance with subsection (e) of this section, the Mayor shall have power to disapprove any items or provisions, or both, of such act and approve the remainder. In any case in which the Mayor so disapproves of any item or provision, he shall append to the act when he signs it a statement of the item or provision

which he disapproves, and shall, within such 10-day period, return a copy of the act and statement with his objections to the Council. If, within 30 calendar days after any such item or provision so disapproved has been timely returned by the Mayor to the Council, two-thirds of the members of the Council present and voting vote to reenact any such item or provision, such item or provision so reenacted shall be transmitted by the Chairman to the President of the United States. In any case in which the Mayor fails to timely return any such item or provision so disapproved to the Council, the Mayor shall be deemed to have approved such item or provision not returned, and such item or provision not returned shall be transmitted by the Chairman to the President of the United States. In the case of any budget act for a fiscal year which is a control year (as defined in § 47-393(4)), this subsection shall apply as if the reference in the second sentence to "ten-day period" were a reference to "five-day period" and the reference in the third sentence to "thirty calendar days" were a reference to "5 calendar days."

D.C. Code § 1-206.02 (2001):

Limitations on the Council.

(a) The Council shall have no authority to pass any act contrary to the provisions of this chapter except as specifically provided in this chapter, or to:

(1) Impose any tax on property of the United States or any of the several states;

(2) Lend the public credit for support of any private undertaking;

(3) Enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District;

(4) Enact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts);

(5) Impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in § 47-1801.04);

***

D.C. Code § 1-207.51 (2001):

Construction.

(a) To the extent that any provisions of this chapter are inconsistent with the provisions of any other laws, the provisions of this chapter shall prevail and shall be deemed to supersede the provisions of such laws.

(b) No law or regulation which is in force on January 2, 1975, shall be deemed amended or repealed by this chapter except to the extent specifically provided herein or to the extent that such law or regulation is inconsistent with this chapter, but any such law or regulation may be amended or repealed by act or resolution as authorized in this chapter, or by Act of Congress, except that, notwithstanding the provisions of § 1-207.52, such authority to repeal shall not be construed as authorizing the Council to repeal or otherwise alter, by amendment or otherwise, any provision of subchapter III of Chapter 73 of Title 5, United States Code, in whole or in part.

D.C. Code § 47-1801.04 (2001):

> General definitions. For the purposes of this chapter and wherever appearing herein, unless otherwise required by the context the term:
>
> (1) "District" means the District of Columbia.
>
> ***
>
> (4) "Individual" means all natural persons (other than fiduciaries), whether married or unmarried.
>
> ***
>
> (17) "Resident" means every individual domiciled within the District at any time during the taxable year, and every other individual who maintains a place of abode within the District for an aggregate of 183 days or more during the taxable year, whether or not such other individual is domiciled in the District. The term "resident" shall not include any elective officer of the government of the United States or any employee on the staff of an elected official in the legislative branch of the government of the United States if such employee is a bona fide resident of the state of residence of such elected officer, or any officer of the executive branch of such government whose appointment to the office held by him was

by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States, or any Justice of the Supreme Court of the United States, unless such officers or Justices are domiciled within the District at any time during the taxable year. In determining whether an individual is a "resident", such individual's absence from the District for temporary or transitory purposes shall not be regarded as changing his domicile or place of abode.

(18) "Nonresident" means every individual other than a resident.

***

D.C. Code § 47-1808.03 (2001):

Tax on unincorporated businesses--Levy and rates.

(a) Except as exempted under subchapter II of this chapter, for the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is levied:

(1) For 1 taxable year beginning after December 31, 1974, a tax at the rate of 12% upon the taxable income of every unincorporated business, whether domestic or foreign;

(2) For the taxable years beginning after December 31, 1975, a tax at the rate of 9% upon the taxable income of every unincorporated business, whether domestic or foreign, except that, effective October 1, 1984, the rate of tax shall be 10% upon the taxable income for any taxable period, except that for taxable years beginning after December 31, 1994, the rate of tax shall be 9.5%;

(3) For the taxable years beginning after December 31, 2002, a tax at the rate of 9.5% upon the taxable income of every unincorporated business, whether domestic or foreign.

(3A)(A) A surtax at the rate of 2.5% on

the tax determined under paragraph (2) or (3) of this subsection, as applicable.

(B) Subparagraph (A) of this paragraph shall apply for any tax period beginning after September 30, 1992.

(3B)(A) A surtax at the rate of 2.5%, separate from and in addition to, the surtax imposed by paragraph (3A) of this subsection, on the tax determined under paragraph (2) or (3) of this subsection, as applicable, for any tax period beginning after September 30, 1994.

(B) Subparagraph (A) of the paragraph shall apply for any tax period beginning after September 30, 1994.

(4) For the taxable years beginning after December 31, 2003, a tax at the rate of 9.975% upon the taxable income of every unincorporated business, whether domestic or foreign.

(b) The minimum tax payable under this section shall be $100.

D.C. Code § 47-1810.01 (2001):

Purpose of chapter.

(a) It is the purpose of this chapter to impose:

(1) An income tax upon the entire net income of every resident and every resident estate and trust; and

(2) A franchise tax upon every corporation, financial institution, and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District; provided, however, that, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this chapter or under Chapter 26 of this title, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this chapter or under Chapter 26 of this title shall not be considered as income from sources within the District for purposes of this chapter; and in the case of any corporation organized as a bank holding company under the provisions of the Bank Holding Company Act of 1956 and the Bank Holding Company Act Amendments of 1970, the amount received as dividends from a corporation which is subject to taxation under this chapter or under the provisions of § 47-2501, and in the case of any such bank holding company not engaged in carrying on any trade or business within the

District, interest received by it from a corporation which is subject to taxation under such sections, shall not be considered as income from sources within the District for purposes of this chapter. Provided further, that income derived from the sale of tangible personal property by a corporation, financial institution, or unincorporated business not carrying on or engaging in trade or business within the District as defined in §§ 47-1801.01 to 47-1801.04 shall not be considered as income from sources within the District for purposes of this chapter, with the exception of income from sale to the United States not excluded from gross income as provided in § 47-1803.02(a)(2)(I); provided, further, that dividends received from subsidiary corporations for whom the taxpayer provides services are deemed to be business income subject to apportionment.

(b) Notwithstanding the provisions of this section, all interest received and all dividends (except dividends of corporations subject to the District of Columbia franchise tax or interest and dividends attributable to any IBF time deposit or IBF loan) received by financial institutions shall be deemed to be business income.

UNITED STATES PUBLIC LAWS
93rd Congress - Second Session
Convening January 21, 1974

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DATA SUPPLIED BY THE U.S. DEPARTMENT OF JUSTICE. (SEE SCOPE)
Additions and Deletions are not identified in this document.

PL 93-407 (HR 15842)
SEPTEMBER 3, 1974

An Act TO INCREASE COMPENSATION FOR DISTRICT OF COLUMBIA POLICEMEN, FIREMEN, AND TEACHERS; TO INCREASE ANNUITIES PAYABLE TO RETIRED TEACHERS IN THE DISTRICT OF COLUMBIA; TO ESTABLISH AN EQUITABLE TAX ON REAL PROPERTY IN THE DISTRICT OF COLUMBIA; TO PROVIDE FOR ADDITIONAL REVENUE FOR THE DISTRICT OF COLUMBIA; AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

***

PART 6--DELEGATION OF GENERAL TAXING

AUTHORITY; AMENDMENTS TO DISTRICT SALES TAX ACT AND MISCELLANEOUS

SEC. 471. IN ORDER TO PROVIDE FOR ADDITIONAL REVENUE TO MEET ADDITIONAL EXPENDITURES RESULTING FROM A COMPENSATION INCREASE ADOPTED FOR PERSONS PAID UNDER THE DISTRICT OF COLUMBIA TEACHERS' SALARY ACT OF 1955, "ANTE, P. 1042." POLICEMEN, AND FIREMEN, THE COUNCIL, IN ACCORDANCE WITH SECTION 406 OF REORGANIZATION PLAN NUMBERED 3 OF 1967, IS AUTHORIZED TO CHANGE THE RATE OF THE TAXES IMPOSED UNDER--,

(1) THE DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX ACT OF 1947, "61 STAT. 628, D.C. CODE 47--1551 NOTE."

(2) THE DISTRICT OF COLUMBIA SALES TAX ACT, "63 STAT. 112, D. C. CODE 47--2601 NOTE."

(3) THE DISTRICT OF COLUMBIA USE TAX ACT, D.C. CODE 47--2701."

(4) THE DISTRICT OF COLUMBIA CIGARETTE TAX ACT, "D.C. CODE 47--2810 NOTE."

(5) THE DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL ACT, D.C. CODE 47--2801 NOTE."

(6) THE ACT OF APRIL 23, 1924 (RELATING TO MOTOR VEHICLE FUEL ACT, "48 STAT. 319, D.C.

CODE 25--101."

(7) TITLE V OF THE DISTRICT OF COLUMBIA REVENUE ACT OF 1937, AND "D.C. CODE 47--1901."

(8) ANY OTHER ACT OF CONGRESS IMPOSING A TAX SOLELY IN THE DISTRICT OF COLUMBIA.

SEC. 472. SECTION 471 SHALL TAKE EFFECT ON THE DATE OF ENACTMENT OF THIS ACT. "50 STAT. 673, D.C. CODE 47--401 ET SEQ."

SEC. 473. SECTION 114(A)(8) OF THE DISTRICT OF COLUMBIA SALES TAX ACT (D.C. CODE, SEC. 47--2601(A)(8) "D.C. CODE 47--504 NOTE, 63 STAT. 112." IS AMENDED TO READ AS FOLLOWS:

"(8) THE SALE OF OR CHARGES FOR ADMISSION TO PUBLIC EVENTS, EXCEPT LIVE PERFORMANCES OF BALLET, DANCE, OR CHORAL PERFORMANCES, CONCERTS (INSTRUMENTAL AND VOCAL), PLAYS (WITH AND WITHOUT MUSIC), OPERAS AND READINGS AND EXHIBITIONS OF PAINTINGS, SCULPTURE, PHOTOGRAPHY, GRAPHIC AND CRAFT ARTS, BUT INCLUDING MOVIES, CIRCUSES, BURLESQUE SHOWS, SPORTING EVENTS, AND PERFORMANCES OR EXHIBITIONS OF ANY OTHER TYPE OR NATURE: PROVIDED, THAT ANY CASUAL OR ISOLATED SALE OF OR CHARGE FOR ADMISSION MADE BY A SEMIPUBLIC

INSTITUTION NOT REGULARLY ENGAGED IN ASKING SUCH SALES OR CHARGES SHALL NOT BE CONSIDERED A RETAIL SALE OR SALE AT RETAIL."

SEC. 741. THE FOLLOWING ACT OR PARTS OF ACTS ARE REPEALED EFFECTIVE JUNE 30, 1975:

(A) TITLE XV OF THE DISTRICT OF COLUMBIA PUBLIC WORKS ACT OF 1954 (D.C. CODE, SEC. 47--501A.). "68 STAT. 119."

(B) THE FOURTH AND FIFTH PARAGRAPHS UNDER THE HEADING "GENERAL EXPENSES" OF THE ACT OF MARCH 3, 1881 (D.C. CODE, (D.C. CODE, SEC. 47--601). "21 STAT. 460, D.C. CODE 47--301.//

(C) THE FIFTH PARAGRAPH UNDER THE PARAGRAPH HEADED "MILITIA" OF THE ACT OF JULY 7, 1898 (D.C. CODE, SEC. 47--602).

(D) SECTION II OF THE ACT OF JUNE 25, 1938 (D.C. CODE, SEC. 47 - 603).

(E) THE FIRST PARAGRAPH OF SECTION 5 (D.C. CODE, SEC. 47--713), AND THE SECOND UNNUMBERED PARAGRAPH OF SECTION 6 (D.C. CODE, SEC. 47--605), OF JULY 1, 1902. "32 STAT. 616; 44 STAT. 833, D.C. CODE 47--713."

(F) THE FIRST SECTION, AND SECTIONS 2,3,4,6,7, AND 8 OF THE ACT OF AUGUST 14, 1894 (D.C. CODE, SECS. 47--604, 701, 702, 704, 707).

(G) THE FIRST FIVE SENTENCES, AND THE LAST TWO SENTENCES, OF SECTION 5(A) OF THE ACT OF AUGUST 17, 1937 (D.C. CODE, SECS., 47--708--47--709). "52 STAT. 372; 84 STAT. 580 D.C. CODE 47--2405."

(H) SECTION 5 OF THE ACT OF MARCH 3, 1883 (D.C. CODE, SEC., 47 - 703). "22 STAT. 569, D.C. CODE 47--621 NOTE."

SEC. 475. EXCEPT AS SPECIFICALLY PROVIDED IN THIS TITLE, NOTHING IN THIS TITLE, OR ANY AMENDMENTS MADE BY THIS ACT, SHALL BE CONSTRUED SO AS TO AFFECT THE AUTHORITY VESTED IN THE COMMISSIONER OF THE K DISTRICT OF COLUMBIA OR THE AUTHORITY VESTED IN THE DISTRICT OF COLUMBIA COUNCIL BY REORGANIZATION PLAN NUMBERED 3 OF 1967. "81 STAT. 948, 5 USC APP. II." THE PERFORMANCE OF ANY FUNCTION VESTED BY THIS TITLE IN THE COMMISSIONER OF THE DISTRICT OF COLUMBIA OR IN ANY OFFICE OR AGENCY UNDER HIS JURISDICTION AND CONTROL, OR IN THE DICTRICT OF COLUMBIA COUNCIL, MAY BE DELEGATED BY THE COMMISSIONER OR BY THE COUNCIL, AS THE CASE MAY BE, IN ACCORDANCE WITH THE PROVISIONS OF SUCH PLAN.

SEC. 476. (A) THE REPEAL OR AMENDMENT BY THIS TITLE OF ANY PROVISION OF LAW SHALL NOT AFFECT ANY ACT DONE OR ANY RIGHT ACCRUED OR ACCRUING UNDER SUCH

PROVISION OF LAW BEFORE THE EFFECTIVE DATE OF THIS TITLE OR ANY SUIT OR PROCEEDING HAD OR COMMENCED BEFORE THE EFFECTIVE DATE OF THIS TITLE, BUT ALL SUCH RIGHTS AND LIABILITIES UNDER SUCH LAW SHALL CONTINUE, AND MAY BE ENFORCED IN THE SAME MANNER AND TO THE SAME EXTENT, AS IF SUCH REPEAL OR AMENDMENT HAD NOT BEEN MADE. "D.C. CODE 47--621 NOTE."

(B) ALL OFFENSES COMMITTED, AND ALL PENALTIES INCURRED, PRIOR TO THE EFFECTIVE DATE OF THIS TITLE, UNDER ANY PROVISION OF LAW HEREBY REPEALED OR AMENDED, MAY BE PROSECUTED AND PUNISHED IN THE SAME MANNER AND WITH THE SAME EFFECT AS IF THIS TITLE HAD NOT BEEN ENACTED.

SEC. 477. EXCEPT AS SPECIFICALLY PROVIDED IN THIS ACT, OR IN OTHER PROVISIONS OF LAW APPLICABLE TO THE DISTRICT OF COLUMBIA, THE COUNCIL MAY BY REGULATION ESTABLISH PENALTIES FOR VIOLATIONS OF ANY PROVISION OF THIS TITLE, INCLUDING ANY REGULATION ISSUED PURSUANT TO THIS TITLE. SUCH PENALTIES MAY NOT EXCEED IMPRISONMENT FOR LONGER THAN ONE YEAR, OR A FINE NOT TO EXCEED $10,000, OR BOTH, FOR EACH OFFENSE. "D.C. CODE 47 - 661."

SEC. 478. EXCEPT AS SPECIFICALLY PROVIDED IN THIS TITLE, THE PROVISIONS

OF THIS TITLE SHALL TAKE EFFECT ON THE DATE OF ENACTMENT OF THIS TITLE, EXCEPT THAT PART 1 AND SUBPARTS A THROUGH G OF PART 2 SHALL APPLY BEGINNING WITH THE FISCAL YEAR BEGINNING JULY 1, 1975. "D.C. CODE 47--621 NOTE"

TITLE V--POWERS OF THE COUNCIL

SEC. 501. "D.C. CODE 47--621 NOTE."NOTWITHSTANDING ANY OTHER PROVISION OF LAW, OR ANY RULE OF LAW, NOTHING IN THIS ACT SHALL BE CONSTRUED AS LIMITING THE AUTHORITY OF THE COUNCIL OF THE DISTRICT COLUMBIA TO ENACT ANY ACT, RESOLUTION, OR REGULATION, AFTER JANUARY 2, 1975, PURSUANT TO THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT WITH RESPECT TO ANY MATTER COVERED BY THIS ACT. "87 STAT. 774, D.C. CODE 1--101 NOTE."

LEGISLATIVE HISTORY:
HOUSE REPORTS: NO. 93--1203 (COMM. ON THE DISTRICT OF COLUMBIA) AND NO. 93--1294 (COMM. OF CONFERENCE).
SENATE REPORTS: NO. 93--1077 (COMM. ON THE DISTRICT OF COLUMBIA) AND NO. 93--1101 (COMM. CONFERENCE).
CONGRESSIONAL RECORD, VOL. 120 (1974):
JULY 29, CONSIDERED AND PASSED HOUSE.
AUG. 8, CONSIDERED AND PASSED SENATE, AMENDED.

AUG. 16 SENATE AGREED TO CONFERENCE REPORT.
AUG. 20, HOUSE AGREED TO CONFERENCE REPORT.

Approved September 3, 1974.

PL 93-407, 1974 HR 15842

END OF DOCUMENT

[CHAPTER 258]

## AN ACT

TO PROVIDE REVENUE FOR THE DISTRICT OF COLUMBIA, AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT THIS ACT, DIVIDED INTO ARTICLES, MAY BE CITED AS THE "DISTRICT OF COLUMBIA REVENUE ACT OF 1947", AND THAT ARTICLE I OF THIS ACT MAY BE CITED AS THE "DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX ACT OF 1947".

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## TITLE I—REPEAL OF PRIOR INCOME TAX ACT AND APPLICABILITY OF THIS ARTICLE; GENERAL DEFINITIONS

SEC. 1. REPEAL OF PRIOR INCOME TAX ACT.–The District of Columbia. Income Tax Act as approved and enacted July 16, 1939, and as amended, is hereby repealed with respect to taxable years or portions thereof beginning on and after the I at day to January 1947 for all purposes, except the following purposes in connection with taxes due or accrued under said District or Columbia Income Tax Act:

(a) For the imposition of assessments and penalties, civil and criminal, for the violation of the violation of or failure to comply with any provisions of such Act and the regulations prescribed thereunder.

(b) For requiring the making, filing, and submission of returns and reports required by such Act;

(c) For the examination of all books, records, and other documents, and witnesses;

(d) For the assessment and collection of the taxes imposed by such Act, and the filing of liens therefore; and

(e) For the allowance of refunds of overpayments of any taxes assessed under the provisions of such Act.

Sec. 2. APPLICABILITY OF ARTICLE.—The provisions of this Article shall apply to the taxable year or part thereof beginning on the 1st day of January 1947 and to succeeding taxable years.

Sec. 3. RETURNS UNDER PRIOR INCOME TAX ACT AND RETURNS FOR FIRST TAXABLE YEAR TO WHICH THIS ARTICLE IS APPLICABLE. —If the taxable year of any person ends on the last day of any month other than December prior to the 1st day of January 1947, such person shall file his return for such taxable year under the provisions of the District of Columbia Income Tax Act as approved and enacted July 26, 1039, and as amended, and pay the taxes imposed by said Act on his income for such taxable year at the times specified therefore in said Act. Such taxpayer shall also file is return of income, received or accrued, according to his method of accounting, during the period between the last day of such taxable year and the 1st day of January 1947 under the provisions of the District of Columbia Income Tax Act as approved July 26, 1039, and as amended, and pay the taxes imposed by said Act on his income for such period at the times specified therefore in said Act. Such portion of such person's income as is received or accrued according to his method of accounting, during taxable years or parts thereof to which this article is applicable shall be reported and taxed under the provisions of this article: *Provided, however,* That any

person whose taxable year ends subsequent to the 1st day of January 1947 may irrevocably elect to file his return of his income for such entire taxable year and pay the taxes imposed thereon under the provisions of this article.

SEC. 4. GENERAL DEFINITIONS.—For the purposes of this article and wherever appearing herein, unless otherwise required by the context—

(a) The word "District" means the District of Columbia.

(b) The word "Commissioners" means the Commissioners of the District of Columbia or their duly authorized representative or representatives.

(c) The word "Assessor" means the Assessor of the District of Columbia or his duly authorized representative or representatives.

(d) The word "Collector" means the Collector of Taxes of the District of Columbia or his duly authorized representative or representatives.

(e) The word "person" means an individual (other than a fiduciary), a fiduciary, a partnership (other than an unincorporated business), an association, an unincorporated business, and a corporation.

(f) The word "individual" means all natural persons (other than fiduciaries), whether married or unmarried.

(g) The word "fiduciary" means a guardian, trustee, executor, committee, administrator, receiver, conservator, or any other person acting in any fiduciary capacity for any person.

(h) The words "trade or business" include the engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District of Columbia; and include the performance of the functions of a public office.

(i) The word "taxpayer" means any person required

by this Article to pay a tax, file a return or report, or apply for a license.

(j) The words "fiscal year" mean an accounting period of twelve months ending on the last day of any month other than December.

(k) The words "taxable year" mean the calendar year or the fiscal year, upon the basis of which the net income of the taxpayer is computed under this Article; if no fiscal year has been established by the taxpayer, they mean the calendar year. The phrase "taxable year" includes, in the case of a return made for a fractional part of a calendar or fiscal year under the provisions of this Article or under regulations prescribed by the Commissioners, the period for which such return is made: Provided, however, That no taxpayer may change from a calendar year to a fiscal year or from a fiscal year to a calendar year within any taxable year without the written permission of the Assessor.

(l) The words "capital assets" mean any property, whether real or personal, tangible or intangible, held by the taxpayer for more than two years (whether or not connected with his trade or business), but do not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the end of the taxable year or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(m) The word "dividend" means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus). wherever earned by the corporation and whether made in cash or any or her property (other than stock of the same class in the corporation if the recipient of such stock dividend has

neither received not exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to during upon or after liquidation or dissolution of the corporation: *Provided however,* That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this article the recipient thereof include any dividend shall be the market value of such property at the time of such distribution: *And provided however.* That the word "dividend" shall not include any dividend paid by a mutual life insurance company to shareholders

(n) The word "stock" includes a share in any association, joint-stock company, or insurance company.

(o) The word "shareholder" includes a member in an association, joint-stock company, or insurance company.

(p) The words "include", "includes", or "including", when used in a definition contained in this article, shall not be deemed to exclude other things otherwise within the meaning of the word or words defined.

(q) The word "deficiency" as used in this Act with respect to any tax imposed by this article means—

(1) the amount or amounts by which the tax imposed by this article as determined by the Assessor exceeds the amount shown as the tax by the taxpayer upon his return; or

(2) the amount assessed as a tax by the Assessor if no return is filed by the taxpayer.

(r) The word "corporation" includes any trust, association, joint-stock company, or partnership which is classed or should be classed as a corporation for purposes of Federal income taxation.

(s) The word "resident" means every individual domiciled within the District on the last day of the

taxable year, and every other individual who maintains a place of abode within the District for more than seven months of the taxable year, whether domiciled in the District or not. In the case of any resident who is an elective or appointive officer or an employee of the Government of the United States, and who is domiciled outside the District during the whole of the taxable year, there shall be excluded from the gross income of such resident salaries or wages received from the Government of the United States for services rendered as such officer or employee, and income derived from sources without the District. For the purposes of this Act the domicile of such officer or employee for any taxable year shall be in the State which be expressly declares to be the State of his domicile: *Provided*, That he shall have had a domicile in such State under the laws of such State immediately prior to the beginning of the taxable year for which the tax is claimed. Such declaration must be made in writing, under oath to the Assessor and the time for filing such declaration shall expire sixty days after written demand to file an income-tax return shall have been received by such officer or employee. As used in this subsection the term "State" means the several States, Territories, and possessions of the United States, and the term "Government of the United States" includes any agency or instrumentality thereof, but does not include the government of be District of Colombia.

(t) The word "nonresident" means every individual other than a resident.

(u) The term "dependent" means any of the following persons over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer:

(1) A son or daughter of the taxpayer, or a

descendant of either.

(2) A stepson or stepdaughter of the taxpayer.

(3) A brother, sister, stepbrother, or stepsister of the taxpayer.

(4) The father or mother of the taxpayer, or an ancestor of either.

(5) A stepfather or stepmother of the taxpayer.

(6) A son or daughter of a brother or sister of the taxpayer.

(7) A brother or sister of the father or mother of the taxpayer.

A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer

The terms "brother" and "sister" include a brother or sister of the half-blood. For the purposes of determining whether any of the foregoing relationships exist, a legally adopted child of a person shall be considered a child of such person by blood. The term "dependent" does not include any individual who is a citizen or subject of a foreign country unless such individual is a resident of the United States or of a country contiguous to the United States.

TITLE II—EXEMPT ORGANIZATIONS

SEC. 1. The following organizations shall be exempt from taxation under this Article:

(a) Labor organizations.

(b) Fraternal beneficiary societies, orders, or associations, (1) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and (2) providing for the payment of life, sick, or accident benefits to the members of such society, order, or association, or their dependents.

(c) Cemetery companies owned and operated exclusively for the benefit of their members and which

are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private individual or shareholder.

(d) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary. Or educational purposes, or for the prevention of cruelty to children or animals, to a substantial extent within the District, no part of the net earnings of which inures to the benefit of any private individual or shareholder, and no tart of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

(e) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private individual or shareholder.

(f) Civic leagues or organizations not organized of profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted principally to charitable, educational, or recreational purposes within the District.

(g) Banks, trust companies, building and loan associations, insurance companies, companies which guarantee the fidelity of any individual or individuals, such as bonding companies, and companies which furnish abstracts of title or which insure titles to real estate, all of which pay taxes on their gross earnings, premiums, or gross receipts under existing laws of the

District.

(h) Corporations organized for the exclusive purpose of holding title to property, collecting income there from, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this article.

(i) Corporations organized under Acts of Congress, if such corporations are instrumentalities of the United States and if, under such Acts, as amended and supplemented, such corporations are exempt from Federal income taxes.

(j) Voluntary employees' beneficiary associations providing for the payment of life, sick, or accident benefits to the members of such association or their dependents, if (1) no part of their net earnings inures (other than through such payments) to the benefit of any private individual or shareholder, and (2) 85 per centum or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses.

(k) Voluntary employees' beneficiary associations providing for the payment of life, sick, or accident benefits to the members of such association or their dependents or their designated beneficiaries, if (1) admission to membership in such association is limited to individuals who are officers or employees of the United States Government or the Government of the District of Columbia, and (2) no part of the net earnings of such association inures (other than through such payments) to the benefit of any private individual or shareholder

## TITLE III—NET INCOME, GROSS INCOME AND EXCLUSIONS THEREFROM, AND DEDUCTIONS

SEC. 1. NET INCOME.—For the purposes of this article and wherever appearing herein, unless otherwise required by the context, the words "net income" mean the gross income of a taxpayer less the deductions allowed by this article.

SEC. 2. GROSS INCOME AND EXCLUSIONS THEREFROM.—(a) The words "gross income" include gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this article, or income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this article, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

(b) The words "gross income" shall not include the following:

(1) PROCEEDS OR LIFE-INSURANCE POLICIES.—The proceeds of life-insurance policies paid by reason of the death of the insured, whether in a single sum or otherwise (but if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income).

(2)ANNUITIES, AND SO FORTH.—(A) Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life-insurance or endowment contract, but if

such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year), then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this title in respect to such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life-insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under subsection (1) or this subsection. This subsection and subsection 2 (b) (1) of this title shall not apply with respect to so much of a

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(d) INFORMATION WHICH MAY BE DISCLOSED.—Nothing contained in section 4 (a) of this title shall be construed to prohibit the Assessor, in his discretion, from divulging or making known any information contained in, or relating to, any report, application, license, or return required under the provisions of this article other than such information as may be contained therein relating to the amount of income or any particulars relating

thereto or the computation thereof.

(e) PENALTIES FOR VIOLATION OF THIS SECTION.—Any violation of the provisions of this section shall be a misdemeanor and shall be punishable by a fine not exceeding $1,000 or imprisonment for six months, or both, in the discretion of the court. All prosecutions under this section shall be brought in the Municipal Court of the District of Columbia on information by the Corporation Counsel of the District of Columbia or any of his assistants in the name of the District of Columbia.

(f) PRESERVATION OF RETURNS.—All reports, applications, and returns received by the Assessor under the provisions of this article shall be preserved for six years, and thereafter until the Assessor orders them to be destroyed.

## TITLE VI—TAX ON RESIDENTS AND NONRESIDENTS

SEC. 1. DEFINITION.—For the purposes of this article, and unless otherwise required by the context, the words "taxable income" mean the entire net income of every resident, in excess of the personal exemptions and credits for dependents allowed by section 2. of this title and that portion of the entire net income of every nonresident which is subject to tax under title VIII of this article.

SEC. 2. PERSONAL EXEMPTIONS AND CREDIT FOR DEPENDENTS.—There shall be allowed to residents the following credits against net income:

(a) An exemption of $1,000 for the taxpayer.

(b) An exemption of $1,000 for the spouse of the

taxpayer (1) if a joint return is made by the taxpayer and his spouse, in which case the aggregate exemption of the spouses shall be $2,000, or (2) if a separate return is made by the taxpayer, and his spouse has no gross income for the calendar year in which the taxable year of the taxpayer begins and is not the dependent of another taxpayer.

(c) An exemption of $500 for the each dependent, as defined in this article, whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than $500, except that the exemption shall not be allowed in respect of a dependent who has made a joint return with his spouse for the taxable year beginning in such calendar year.

(d) If the status of a taxpayer changes during the taxable year with respect to his marital status the amount allowed under subsection (b) of this section shall be apportioned in accordance with the number of months before and after such change. For the purposes of this subsection, a fractional part of a month shall be disregarded unless it amounts to more than half a month, in which case it shall be considered as a month.

(e) Beginning with the first taxable year to which this article is applicable and in succeeding taxable years, the amounts allowed under subsections (a) and (b) of this section shall be prorated to the day of death in the final return of a decedent dying before the end of the taxable year, and as of the date of death the personal exemption is terminated and not extended over the remainder of the taxable year.

(f) In the case if a return made for a fractional part of a taxable year, the personal exemptions and credits for dependents shall be reduced, respectively, to amounts which bear the same ratio to the full credits provided as the number of months in the period for

which the return is made bear to twelve months.

SEC. 3. IMPOSITION AND RATES OF TAX.—There is hereby annually levied and imposed for each taxable year upon the taxable income of every resident a tax at the following rates:

One per centum on the first $5,000 of taxable income.

One and one-half per centum on the next $5,000 of taxable income.

Two per centum on the next $5,000 of taxable income.

Two and one-half per centum on the next $5,000 of taxable income.

Three per centum on the taxable income in excess of $20,000.

SEC. 4. (a) OPTIONAL METHOD OF COMPUTATION.—In lien of the method of computation prescribed by section 3 of this title, a resident reporting on a cash basis for any full calendar year who does not claim credit for taxes paid by him to any State or Territory of the United States or political subdivision thereof under the provisions of section 5 of this title on the whole or any part of his income for such calendar year and, if his gross income for such calendar year is $5,ooo or less, and is derived solely from salaries, wages, dividends, and interest, may elect to pay the tax as shown in the following table

[Printers Note: See end of appendix]

(b) In applying the above schedule, to determine the tax of taxpayer with one or more dependents, there shall be subtracted from his gross income beginning with the first taxable year to which this article is applicable and succeeding taxable years. $500 for each

dependent as defined in this article.

(c) In applying the shove schedule, to determine whether the taxpayer is entitled to the personal exemption of $1,000 or $2,000, his status during the greater portion of the taxable year, as defined in this article, shall control

(d) An individual not living with husband or wife during the greater portion of the taxable year for the purposes of this article, shall be considered as a single person.

(e) The election given by this section as to the computation of tax due shall be considered to have been made if the taxpayer files the return prescribed for such computation and such election shall be final and irrevocable.

(f) If the taxpayer for any taxable year has filed a return computing his tax without regard to this section, he may not thereafter elect for such year to compute his tax under this section.

(g) This section shall not apply to any fiduciary or to any married resident living with husband or wife at any time during the taxable year whose spouse files a return and computes the tax without regard to this section.

(h) If a husband and wife living together file separate returns, each shall be treated as a single person for the purposes of this section.

SEC. 5. CREDIT AGAINST TAX ALLOWED RESIDENTS.—The amount of tax payable under this title by an individual who, although a resident of the District of Columbia as defined in this article, was nevertheless a bona fide domiciliary of any State or Territory of the United States or political subdivision thereof during the taxable year shall be reduced by the amount required to be paid by such individual as

income or intangible personal property taxes, or both, for such taxable year to the State, Territory, or political subdivision thereof of which he was a domiciliary. The Assessor may require proof, satisfactory to him of the payment of such income or intangible personal property taxes: *Provided however.* That the credit provided for by this section shall not be allowed against any tax imposed under title VIII of this article.

## TITLE VII—TAX ON CORPORATIONS

SEC. 1. TAXABLE INCOME DEFINED.—For the purposes of this title, and unless otherwise required by the context, the words "taxable income" mean the amount of net income derived from sources within the District within the meaning of title X of this article.

SEC. 2. IMPOSITION AND RATE OF TAX.—For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every corporation, whether domestic or foreign (except those expressly exempt under title II of this article).

## TITLE VIII—TAX UNINCORPORATED BUSINESSES

SEC. 1. DEFINITION OF UNINCORPORATED BUSINESS.—For the purposes of this article (not alone of this title) and unless otherwise required by the contest the words "unincorporated business" mean any trade or basinets conducted or engaged in by any individual, whether resident or nonresident statutory or common-law trust, estate, partnership, or limited or

special partnership society, association, executor, administrator, receiver trustee liquidator, conservator, committer assigner or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include any trade or business which if conducted or engaged in by a corporation would be taxable under title VII of this article. The words "unincorporated business" do not include any trade or business which by how, customs, or ethics cannot be incorporated or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor.

SEC. 2 TAXABLE INCOME DEFINED.—For the purposes of this title, and unless otherwise require by the context, the words "taxable income" mean the amount of net income derived from sources within the District within the meaning of title X of this article in excess of the exemption granted by section 4 of this title.

SEC. 3. IMPOSITION AND RATE OF TAX.—For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 5 per centum upon the taxable income of every unincorporated business, whether domestic or foreign (except those expressly exempt under title II of this article).

SEC. 4. EXEMPTION.—Before computing the tax upon the taxable income of an unincorporated business, there shall be deducted there-from an exemption of $10,000, except that where the period covered by a

return is less than a year, or where a return shows that an unincorporated business has been carried on for less than twelve months, such exemption shall be prorated on a daily basis: *Provided, however.* That any amount exempted under this section from the tax imposed by section 3 of this title shall be reported and included in the gross income of that person or those persons entitled to a share therein in proportion to the share to which each person is entitled, and shall be reported in the return of each of such persons for his taxable year in which is ended the taxable year of the unincorporated business.

SEC. 5. BY WHOM PAYABLE.—The taxes imposed by section 3 of this title shall be payable by the person or persons, jointly and severally, conducting the unincorporated business. The taxes imposed under this title may be assessed in the name of the unincorporated business or in the name or names of the person or persons liable for the payment of such taxes, or both.

SEC. 6. PARTNERS ONLY TAXABLE.—Individuals carrying on any trade or business in partnership in the District, other than an unincorporated business, shall be liable for income tax only in their individual capacities. The tax on all such income shall be assessed against the individual partners under title VI of this article. There shall be included in computing the net income of each partner his distributive share, whether distributed or not of the net income of the partnership for the taxable year: or if his net income for such taxable years is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the

basis of which the partner's net income is computed.

## TITLE IX—TAX ON ESTATES AND TRUSTS

SEC. 1. RESIDENT AND NONRESIDENT ESTATES AND TRUSTS.—For the purposes of this title, estates and trusts are (a) resident estates or trusts, or (b) nonresident estates or trusts. If the decedent was at the time of his death domiciled within the District, his estate is a resident estate, and any trust created by his will is a resident trust. If the decedent was not at the time of his death domiciled within the District, his estate is a nonresident estate, and any trust created by his will is a nonresident trust. If the creator of a trust was at the time the trust was created domiciled within the District or if the trust consists of property of a person domiciled within the District, the trust is a resident trust. If the creator of the trust was not at the time the trust was created domiciled within the District, of the trust for which the trust is not exempt under subsection (a) of this section shall be included in the gross income of an employee for the taxable year in which the contribution is made to the trust in the ease of an employee whose beneficial interest in such contribution is nonforfeitable at the time the contribution is made.

## TITLE X—PURPOSE OF ARTICLE AND ALLOCATION AND APPORTIONMENT

SEC. 1. PURPOSE OF ARTICLE. —It. is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the

privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: Provided, however, That, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this article shall not be considered as income from sources within the District for the purposes of this article. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as in derived from sources within the District.

SEC. 2. ALLOCATION AND APPORTIONMENT.—The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this article, be deemed to be from sources within the District, and shall, along with other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived there-from shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The

Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article.

SEC. 3. ALIIS OF TSCE AND DEDUCTIONS BETWEEN ORGANIZATIONS. AND SO FORM—In any of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the District and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Assessor is authorized to distribute, apportion, or allocate gross income or deductions between or among such organizations, trades, or businesses, whenever in his opinion such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses. The provisions of this section shall apply, but shall not be limited in application to any case of a common carrier by railroad subject to the Interstate Commerce Act and jointly owned or controlled directly or indirectly by two or more common carriers by railroad subject to said Act

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| Gross Income less allowance for dependents | | Personal exemption status | | | Gross Income less allowance for dependents | | Personal exemption status | |
|---|---|---|---|---|---|---|---|---|
| Over | But not over | $1,000 | $2,000 | | Over | But not over | $1,000 | $2,000 |
| | Tot | Tot | | | | | Tot | Tot |
| 0.00 | $1.150 | 0.00 | 0 | | $3.050 | $3.100 | $17.50 | $7.50 |
| 1.15 | 1.200 | 0.50 | 0 | | 3.100 | 3.150 | 18.00 | 8.00 |
| 1.20 | 1.250 | 1.00 | 0 | | 3.150 | 3.200 | 18.50 | 8.50 |
| 1.25 | 1.300 | 1.50 | 0 | | 3.200 | 3.250 | 19.00 | 9.00 |
| 1.30 | 1.350 | 2.00 | 0 | | 3.250 | 3.300 | 19.50 | 9.50 |
| 1.35 | 1.400 | 2.50 | 0 | | 3.300 | 3.350 | 20.00 | 10.00 |
| 1.40 | 1.450 | 3.00 | 0 | | 3.350 | 3.400 | 20.50 | 10.50 |
| 1.45 | 1.500 | 3.50 | 0 | | 3.400 | 3.450 | 21.00 | 11.00 |
| 1.50 | 1.550 | 3.50 | 0 | | 3.450 | 3.500 | 21.50 | 11.50 |
| 1.55 | 1.600 | 4.00 | 0 | | 3.500 | 3.5050 | 21.50 | 11.50 |
| 1.60 | 1.650 | 4.50 | 0 | | 3.550 | 3.600 | 22.00 | 12.00 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 1.65 | 1.700 | 5.00 | 0 | | 3.600 | 3.650 | 22.50 | 12.50 |
| 1.70 | 1.750 | 5.50 | 0 | | 3.650 | 3.700 | 23.00 | 13.00 |
| 1.75 | 1.800 | 6.00 | 0 | | 3.700 | 3.750 | 23.50 | 13.50 |
| 1.80 | 1.850 | 6.50 | 0 | | 3.750 | 3.800 | 24.00 | 14.00 |
| 1.85 | 1.900 | 7.00 | 0 | | 3.800 | 3.850 | 24.50 | 14.50 |
| 1.90 | 1.950 | 7.50 | 0 | | 3.850 | 3.900 | 25.00 | 15.00 |
| 1.95 | 2.000 | 8.00 | 0 | | 3.900 | 3.950 | 25.50 | 15.50 |
| 2.00 | 2.050 | 8.00 | 0 | | 3.950 | 4.000 | 26.00 | 16.00 |
| 2.05 | 2.100 | 8.50 | 0 | | 4.000 | 4.050 | 26.00 | 16.00 |
| 2.10 | 2.150 | 9.00 | 0 | | 4.050 | 4.100 | 26.50 | 16.50 |
| 2.15 | 2.200 | 9.50 | 0 | | 4.100 | 4.150 | 27.00 | 17.00 |
| 2.20 | 2.250 | 10.00 | 0 | | 4.150 | 4.200 | 27.50 | 17.50 |
| 2.25 | 2.300 | 10.50 | 30.60 | | 4.200 | 4.250 | 28.00 | 18.00 |
| 2.30 | 2.350 | 11.00 | 1.00 | | 4.250 | 4.300 | 28.50 | 18.50 |
| 2.35 | 2.400 | 11.50 | 1.50 | | 4.300 | 4.350 | 29.00 | 19.00 |
| 2.40 | 2.450 | 12.00 | 2.00 | | 4.350 | 4.400 | 29.50 | 19.50 |
| 2.45 | 2.500 | 12.50 | 2.50 | | 4.400 | 4.450 | 30.00 | 20.00 |
| 2.50 | 2.505 | 12.50 | 2.50 | | 4.450 | 4.500 | 30.50 | 20.50 |
| 2.55 | 2.600 | 13.00 | 3.00 | | 4.500 | 4.550 | 30.50 | 20.50 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 2.60 | 2.650 | 13.50 | 3.50 | 4.550 | 4.600 | 31.00 | 21.00 |
| 2.65 | 2.700 | 14.00 | 4.00 | 4.600 | 4.650 | 31.50 | 21.50 |
| 2.70 | 2.750 | 14.50 | 4.50 | 4.650 | 4.700 | 32.00 | 22.00 |
| 2.75 | 2.800 | 15.00 | 5.00 | 4.700 | 4.750 | 32.50 | 22.50 |
| 2.80 | 2.850 | 15.50 | 5.50 | 4.750 | 4.800 | 33.00 | 23.00 |
| 2.85 | 2.900 | 16.00 | 6.00 | 4.800 | 4.850 | 33.50 | 23.50 |
| 2.90 | 2.950 | 16.50 | 6.50 | 4.850 | 4.900 | 34.00 | 24.00 |
| 2.95 | 3.000 | 17.00 | 7.00 | 4.900 | 4.950 | 34.50 | 24.50 |
| 3.00 | 3.050 | 17.50 | 7.50 | 4.950 | 5.000 | 35.00 | 25.00 |

D.C. Code § 11-921 (2001):

Civil jurisdiction.

(a) Except as provided in subsection (b), the Superior Court has jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia. Such jurisdiction shall vest in the court as follows:

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(3) Beginning on such effective date, the court has jurisdiction (regardless of the amount in controversy) of any civil action or other matter, at law or in equity, which --

***

(B) involves an appeal from or petition for review of any assessment of tax (or civil penalty thereon) made by the District of Columbia; or

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D.C. Code § 11-1201 (2001):

Exclusive jurisdiction.

The Tax Division of the Superior Court shall be assigned exclusive jurisdiction of --

(1) all appeals from and petitions for review of assessments of tax (and civil penalties thereon) made by the District of Columbia; and

(2) all proceedings brought by the District of Columbia for this imposition of criminal penalties pursuant to the provisions of the statutes relating to taxes levied by or in behalf of the District of Columbia.

D.C. Code § 11-1202 (2001):

Abolition of other remedies.

Notwithstanding any other provision of law, the jurisdiction of the Tax Division of the Superior Court to review the validity and amount of all assessments of tax made by the District of Columbia is exclusive. Effective on and after the effective date of the District of Columbia Court Reorganization Act of 1970, any common-law remedy with respect to assessments of tax in the District of Columbia and any equitable action to enjoin such assessments available in a court other than the former District of Columbia Tax Court is abolished. Actions properly filed before the effective date of that Act are not affected by this section and the court in which any such action has been filed may retain jurisdiction until its disposition.